NATIONAL CENTER FOR STATE COURTS

Final Report for the Massachusetts Project on Innovative Jury Trial Practices

Prepared for the National Center for Citizen Participation in the Administration of Justice
January 30, 2001

with funding by the State Justice Institute

SJI State Justice Institute

By:

Paula L. Hannaford
Senior Research Associate
300 Newport Avenue
Williamsburg, VA 23185

G. Thomas Munsterman
Director, Center for Jury Studies
2425 Wilson Boulevard, Suite 350
Arlington, VA 22201

Court Research Division
National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185

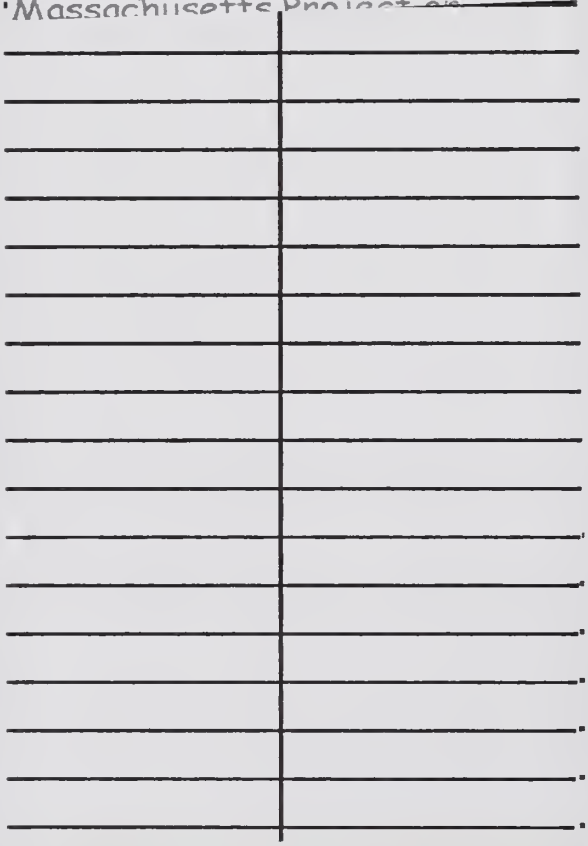
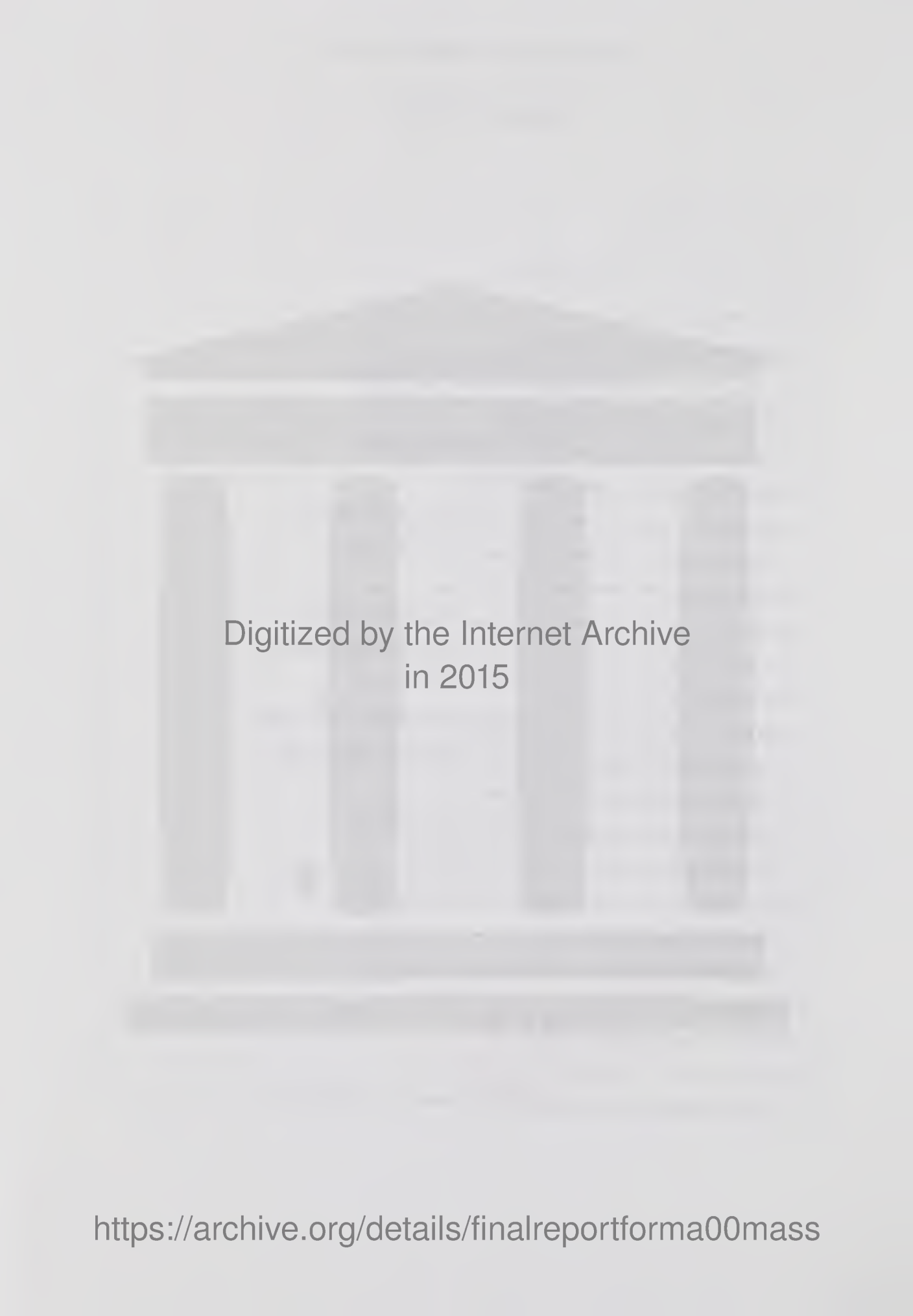


TABLE OF CONTENTS



I. EXECUTIVE SUMMARY

The Massachusetts Project on Innovative Jury Practices is a demonstration project intended to encourage the use of jury trial practices that enhance juror performance and satisfaction with jury service. The project consisted of an initial conference in which judges, former jurors, and lawyers discussed innovative jury practices in use in Massachusetts and elsewhere. The judicial attendees then participated in a year-long project in which they introduced these practices in their own courtrooms and periodically met to share their experiences and insights about the practices. To document the use of these practices, jurors were asked to complete questionnaires about their assessments of the innovative practices used in the trials in which they served. The participating judges also completed surveys describing the frequency of use and the relative helpfulness of these practices, as did the attorneys. Reports were filed on 150 cases by 1264 jurors and 176 attorneys.

The ultimate goal of the project is to give the judges who participated in the initial conference sufficient time and opportunity to become familiar and comfortable with these practices, so that they may serve as educators for their judicial colleagues throughout the Commonwealth.

The vast majority of the jury trial practices examined were received with great enthusiasm by the judges, jurors, and attorneys who participated in the study, and none of them reported any serious problems with their implementation. In particular, juror notetaking, preinstructions on the law, and post-verdict meetings between the judge and jurors were highly recommended practices. A few of the practices were used less

frequently than others. Some are designed primarily for use in more complex or difficult trials (e.g., juror notebooks, debriefings for juror stress). Others require more pretrial preparation or additional resources than is generally available to Massachusetts trial judges. For two of the practices, there were also questions about whether they were permissible under existing Massachusetts law.

This report summarizes the empirical data and anecdotal experiences of the participating judges, jurors and attorneys, and makes recommendations about structural changes and resources necessary to permit the greatest use of these practices.

II. ACKNOWLEDGEMENTS

A study of this magnitude always depends on the support and encouragement of many individuals. The authors wish to express their gratitude to Florence Rubin, President, National Center for Citizen Participation in the Administration of Justice, who initiated this project and has worked tirelessly to improve to conditions of jury service for the citizens of Massachusetts; Chief Justice Herbert P. Wilkins (ret.) for his support of the project's goals and research efforts; Robert Brink, Executive Vice President, Flaschner Judicial Institute, who supported this project with funding and logistical support; Judge Peter M. Lauriat of the Superior Court who served as the coordinator for the judges in the project and acted as facilitator at numerous meetings; Anne Walker and the late Robert Lowe of the staff of the Massachusetts Supreme Judicial Court who coordinated data entry for the study data; and most importantly, the Massachusetts Trial Court judges who agreed to participate in the study by introducing these reform practices in their courtrooms. This study was funded by State Justice Institute grant SJI-98-N-135 ("The Jury Project: Judicial Education Program") to the National Center for Citizen Participation in the Administration of Justice. The points of view expressed are those of the authors and do not necessarily represent the official positions or policies of the State Justice Institute, the National Center for Citizen Participation in the Administration of Justice, or the National Center for State Courts.

III. PROJECT HISTORY AND OVERVIEW

The Massachusetts Project on Innovative Jury Trial Practices is part of a judicial education project sponsored by the National Center for Citizen Participation in the Administration of Justice in collaboration with the Flaschner Judicial Institute. The primary objectives of this project are to identify trial practices that increase juror comprehension, aid jurors in their decision-making tasks, improve juror satisfaction with jury service, and to encourage the use of the more effective practices by trial judges in Massachusetts. To accomplish these objectives, project staff and participants selected 16 jury trial practices designed to enhance juror satisfaction and performance, and tested the effectiveness of these practices in Massachusetts jury trials. Major funding for this project was provided by the State Justice Institute and the Massachusetts Bar Foundation. Additional grant support for the Jury Project came from the Boston Foundation, the Hyams Foundation, and the Massachusetts Council for Public Justice.

The project began in November 1997 with a two-day conference in which 24 Massachusetts judges, primarily from the Superior and District Courts, met with experts in jury trial procedures, former jurors, and lawyers to discuss new jury trial practices used by some Massachusetts judges and judges in other states. The conference featured a presentation by a panel of jurors, addresses by Hon. William G. Young (U.S.D.C. Mass.) and Hon. B. Michael Dann (Super. Ct. Ariz., Maricopa County), and G. Thomas Munsterman (Center for Jury Studies, National Center for State Courts), and a series of workshops in which faculty and attendees discussed specific innovative practices.

Following the conference, the conference attendees were invited to participate in a year-long demonstration program to examine these practices in their own courtrooms to determine whether these practices should be encouraged on a broader scale in Massachusetts jury trials. Participating judges were asked to distribute surveys to trial jurors soliciting their reactions to various jury practices that the judges employed at trial. Similar surveys were provided to the judges and trial attorneys for their perspectives on the practices. Completed surveys were then forwarded to the research staff of the Supreme Judicial Court for data entry, and were analyzed by the Center for Jury Studies of the National Center for State Courts. Throughout the project period, the participating judges met periodically to share their experiences with the practices. This report and its recommendations for specific practices are based on the survey responses and the consensus of the judges participating in the demonstration project.

Of the 24 judges who attended the 1997 conference, a total of 16 judges (10 Superior Court[1] and 6 District Court) participated in the study by submitting questionnaires from a total of 150 cases. A total of 1,264 jurors and 176 attorneys from those cases also participated in the study. The majority of cases (66%) were criminal trials, although the proportion was somewhat skewed by the heavy concentration of criminal trials (83%) submitted by the District Court judges; Superior Court judges submitted almost equal numbers of criminal (38) and civil (39) trials for inclusion in the study.

[1] One of the participating judges began the project as a District Court judge, but was later appointed to the Superior Court. His participation is documented as that of a Superior Court judge for the purposes of this report. Another judge was appointed to the Massachusetts Appeals Court early in the project.

The cases themselves appear to be reasonably representative of the jury trial caseloads in Massachusetts Superior and District Courts. The civil cases included auto tort (9), medical malpractice (8), premises liability (7), products liability (1), intentional tort (3), contract (8), and "other" or "not reported" cases (15). The criminal cases included homicide (3), rape/sexual assault (11), armed robbery (4), assault and battery (21), distribution or manufacture of illegal drugs (9), "OUI" (26), and "other" or "not reported" cases (31).[2] Trials were significantly longer, and presumably more complex, in Superior Court cases (4.9 days) compared to those in District Court (1.5 days), with civil trials taking the greatest length of time (5.0 days compared to 3.1 days in criminal trials).

The breakdown of trial dispositions was somewhat unusual, ostensibly due to the large proportion of cases (23%) in which the trial outcome was not reported. In civil cases, the jury returned a verdict for the plaintiff in 40% of the trials and for the defendant in 48% of the trials, with the remaining 12% of trials settling prior to verdict. In criminal cases, the jury returned guilty verdicts (on some or all charges) in 51% of the trials and not guilty verdicts in 45% of the trials, with plea agreements (3%) or mistrials (1%) in the remaining trials.

[2] Three cases had insufficient information to classify them as civil or criminal trials.

IV. RECOMMENDATIONS

In the study, judges, jurors, and attorneys were asked to comment on the use and helpfulness of 16 specific reform practices.[3] These included:

- juror notetaking;
- juror notebooks;
- preinstructing the jury;
- juror questions to witnesses;
- "plain English" at trial;
- mini-opening statements / interim commentary;
- pretrial limits on each party's time at trial;
- permitting jurors to discuss the evidence prior to final deliberations;
- "plain English" jury instructions;
- permitting jurors to ask questions about final instructions;
- providing jurors with written or taped copies of final instructions;
- giving jurors the final instructions before closing arguments;
- giving jurors suggestions on conducting deliberations;
- post-verdict meetings with the judge and jurors;
- debriefing for juror stress; and
- post-verdict meetings with the judges, attorneys and jurors.

Overall, the participating judges were enthusiastic about the majority of reform practices that they introduced in their courtrooms. One of the judges commented "[a]ll of the practices used in the project seem to involve the jury more actively in the learning process necessary to a rational decision. Jurors in my experience have reacted very favorably to the practices. I have found virtually no drawbacks in or contraindications to

[3] *See generally* G. THOMAS MUNSTERMAN et al. (eds.), JURY TRIAL INNOVATIONS (1997).

using these practices."[4] Another judge had equally high praise for the practices introduced as part of the project, stating "[t]he Jury Innovation Project provided a wonderful incentive for thinking about how to communicate with jurors more effectively and to engage them in the trial process more fully."[5]

The following sections describe these practices in order of their frequency of use during the study.

A. Permitting Jurors to Take Notes

Permitting jurors to take notes concerning testimony and other evidence presented at trial has been an approved practice in Massachusetts since 1978[6]. Perhaps for this reason, it was the most frequently used technique of all of those included in the Innovative Jury Trial Practices Project. Of the 150 trials included in the study, jurors were permitted to take notes in 141 (95%) of them. The 8 trials in which notetaking was not permitted were District Court trials, which are generally shorter and less complex than trials conducted in the Superior Court.[7]

Judges that permitted jurors to take notes unanimously reported that it was helpful, although several judges commented that some jurors declined to take notes even when given the opportunity to do so – particularly in more straight-forward cases. Although only 86% of jurors who were permitted to take notes reported that they did so, these statistics are consistent with other studies of juror notetaking. Ninety-six percent (96%) of these jurors reported that they found notetaking to be very or somewhat helpful.

---

[4] Statement of Justice Patrick F. Brady (Mar. 2, 2000).
[5] Statement of Judge Nonnie S. Burnes (Mar. 1, 2000).
[6] Mass. Sup. Ct. R. 8A; Bencosme v. Kokoras, 400 Mass. 40, 44 (1987); Mass. Jury Trial Benchbook § 4.5 at 92, Peter M. Lauriat & Toni L. Pomeroy eds., Franklin N. Flaschner Judicial Institute (1996).
[7] The rule permitting juror notetaking only applies to Superior Court trials. It is possible that judges in other courts were relatively unfamiliar with this practice, which may explain why it was used less in those courts.

None of the judges reported that juror notetaking disrupted trial procedures or that jurors used their notes inappropriately, as some critics of this technique have argued. This consensus is also supported by existing empirical studies of juror notetaking[8].

Several of the judges who participated in the study reported that they sometimes place certain constraints on juror notetaking, both as a matter of logistical convenience and to ensure that this technique serves its proper purpose – namely, to aid juror recollection of the evidence. For example, to ensure that jurors focus their notetaking on evidence rather than argument, many judges instruct jurors not to take notes until the beginning of the evidentiary segment of the trial. To the same end, some judges do not distribute writing materials until after the attorneys have given their opening statements. Other judges permit jurors to take notes during any portion of the trial, but instruct jurors to draw a line in their notes after the lawyers' opening statements to distinguish clearly between argument and evidence. One judge used juror notetaking to emphasize curative instructions by asking jurors to write them down verbatim on their notepads.

The general consensus of the judges was that jurors serving in all Massachusetts jury trials should be permitted to take notes, and that judicial education efforts should encourage all judges to use this technique. Nevertheless, the judges who participated in this study felt that the decision to permit juror notetaking in individual cases should be left to the discretion of the trial judges, and therefore a statute or court rule mandating that judges permit juror notetaking was unnecessary.

---

[8] *See, e.g.,* Larry Heuer & Steven Penrod, "Juror Notetaking and Question Asking During Trials," 18 Law & Hum. Behav. 121 (1994).

B. Giving Jurors Preliminary Instructions on the Law

Preinstructions for the jury consist fundamentally of an introduction to the parties and their claims, a presentation of matters not in dispute, and guidance on the contested issues and governing legal principles of the case. The purpose of preinstructions is to provide the jury with a contextual framework of the applicable law in which to consider the evidence presented at trial, thus aiding juror comprehension and recollection of important information. This technique does require sufficient pretrial management of the case to give the judge an adequate understanding of the claims and defenses that the attorneys actually intend to raise at trial. Ideally, this information can be obtained during a pretrial conference with the attorneys. In the study, judges preinstructed the jury in 137 (91%) of the trials and unanimously reported that it was a helpful technique.

One judge participating in the study preinstructed the jury after the lawyers had given their opening statements, which tended to minimize the risk that the judge would preinstruct on a claim or charge that the lawyers' had decided to forego immediately before trial. Generally, the preinstruction was given at the same time that instructions on administrative bookkeeping and general legal principles (e.g., burden of proof) were given.

Judicial comments indicated some disagreement in criminal cases, however, on the issue of whether preinstructions should include a description of the specific elements of the crime. The majority of the judges favored preinstructions on the elements of the crime, but cautioned against preinstructions on defenses to the crime unless it is absolutely certain that the defendant will raise that defense at trial (e.g., insanity, self-defense) or if the defendant specifically requests preinstructions. Other judges limit

preinstructions to the primary charges only, in case some claims or charges are subsequently dismissed during trial.

The vast majority of attorney comments supported the practice of preinstructions, generally on the grounds that such instructions provide jurors with a necessary understanding of the legal issues and help focus jurors' attention on critical aspects of the trial. A few attorneys expressed concern, however, that there were too many disputed issues in their respective cases to summarize in a brief and concise manner. Jurors, on the other hand, found this technique extremely helpful. Eighty-eight percent (88%) reported that the judge instructed the jury about the law at the beginning of the trial, and of these 94% reported that preinstructions were somewhat or very helpful.

C. Using "Plain English" During Trial

A strong correlation exists between juror satisfaction with jury service and how well jurors understood the proceedings in which they participated and their role within those proceedings. To maximize jurors' understanding, the judge, court staff, and trial attorneys should use "plain English" during trial, avoiding "legalese" vocabulary to the greatest extent possible when communicating with the jury. Thus, terms such as "plaintiff," "cause of action," and "indictment" are either replaced with or explained by more familiar terminology.

Many of the judges commented that they try to employ this technique as often as possible in jury trials. Of the 150 cases in the study, judges reported using "plain English" in 123 (82%) of them, and those that did found it useful in almost all cases. Jurors were somewhat more positive, reporting that the judge and attorneys used plain English in 95% of the cases and explained legal terms 94% of the time. As one attorney

noted, however, this technique is "easy to say, hard to do" – especially in trials involving more complex factual issues (e.g., electrical engineering, medical malpractice). One attorney objected to the use of "plain English" in legal terms-of-art, claiming that it tended to introduce "vagueness" into the jury's deliberative process.

D. Post-Verdict Meetings with the Judge and Jurors

Post-verdict meetings between the trial judge and jurors provide an opportunity for the judge to answer general questions from jurors about the trial or post-trial procedures (e.g., evidentiary or sentencing issues). The judge may also solicit feedback from the jurors about their reactions to jury service and any suggestions for improving jury administration and management. In this study, the trial judge met informally with jurors after the verdict had been received in 118 (79%) of the trials in the study sample. Only one of the 16 judges who participated in the study did not meet with the jury for at least one of the trials. Judges indicated that jurors were overwhelmingly positive about the invitation to meet with the judge. One judge said that it was a tremendous learning experience for him as well.

Although the judges were aware of objections to this technique – namely that jurors might reveal something about their deliberations that might be used by the parties to appeal the verdict – in their collective experience, this had never happened. Most attributed the lack of problems to their use of "ground rules" to govern the meetings. They would ask the jurors at the beginning of the meeting to refrain from discussing their deliberations and would inform jurors that judges could not comment on the verdict. Several judges also developed neutral responses when jurors asked whether they had arrived at the right verdict. One judge, for example, tells her jurors that "I know it's the

right verdict, because there were 12 conscientious, considerate, intelligent, hard-working jurors and both sides got a fair trial."[9]

Ninety-four percent (94%) of jurors reported that they attended this meeting and, of those, 95% found it helpful. Several made appreciative comments about the judges taking the time to thank jurors and answer their questions. Attorneys generally did not attend these meetings (see Section M, below), and at least one attorney questioned why such a meeting would be beneficial for judges.[10]

E. Using "Plain English" Jury Instructions

This technique requires judges and trial attorneys to draft jury instructions in comprehensible language, with specific attention to the overall character and structure of the jury charge. Although it is lauded as one of the most sensible innovations in jury trial management, it is a time and labor-intensive process that requires significant involvement by the judge and trial attorneys either in pretrial meetings or during trial – something that many are unwilling to do without assurances that specially drafted jury instructions will survive appellate scrutiny. Consequently, it is rarely done on a consistent basis except in those few jurisdictions that have undertaken a comprehensive redrafting of their pattern jury instructions.

The judges in this study admitted slightly less use of "plain English" in their jury instructions than in their verbal communication with the jury (112 versus 123 cases). This is unsurprising given the limited amount of pretrial management typically conducted in Massachusetts. From the judges' comments concerning this technique, the drafting of

---

[9] Comments of Judge Bertha D. Josephson at Roundtable Discussion on Massachusetts Innovative Jury Trial Practices 45 (Newton, Mass., Feb. 28, 2000).

[10] "Why does almost every judge want to schmooze with the jury after trial? We don't "elect" judges in Mass! And what is there for the judge to learn? It is the lawyers who might learn something."

"plain English" instructions can be facilitated through feedback from the jury. One judge, for example, revised an instruction after jurors questioned the meaning of a phrase.[11] Indeed, it is somewhat surprising that this technique was used as much as was reported. When it was used, however, judges were unanimously positive about its helpfulness to the jury. Most (94%) jurors reported that they understood the judge's final instructions and many of the attorneys noted the clarity and precision of the jury instructions.

F. Giving Jurors Suggestions for Conducting Deliberations

The vast majority (75%) of jurors who participated in this study were serving as jurors for the very first time. Thus, only a few jurors had the benefit of prior jury service as a guide for how deliberations should be conducted. Suggestions for conducting deliberations can help overcome the awkwardness that often accompanies inexperience, and can provide a practical framework for jurors to undertake their decision-making tasks. The specific focus of these suggestions can include selecting the foreperson (if not previously selected by the judge[12]), avoiding early public votes on the verdict, conducting small group discussions, allocating group tasks among jurors, working with jury instructions, and handling disagreement or deadlock.[13]

Trial judges provided suggestions about deliberations to jurors in 90 (60%) of the trials in the study sample, and most felt that this was a helpful technique. Jurors indicated a greater number of judges provided such instructions (81%), however they were

---

[11] Comments of Judge Peter Lauriat at the Roundtable Discussion on Massachusetts Innovative Jury Trial Practices 30 (Newton, Mass., Feb. 28, 2000).

[12] The general practice in Massachusetts is for the trial judge to select the presiding juror. A few judges, however, have begun permitting the jurors to elect their own presiding juror.

[13] *See* Christopher N. May, "'What Do We Do Now?: Helping Juries Apply the Instructions," 28 Loyola L.A. L. Rev. 869 (1995).

somewhat less positive about the benefits of these suggestions. According to jurors, such suggestions included suggestions about when and how to take a vote on the verdict (58%) and guidance about how to handle disagreements (29%). Eighty-eight percent (88%) reported that these suggestions were somewhat or very helpful. For trials in which the judge did not provide such instructions, only 30% indicated that they would have wanted the judge to do so.

G. Permitting Jurors to Submit Questions to Witnesses

Many empirical studies of jury behavior have noted that jurors often have difficulty understanding the evidence, particularly in complex cases. Traditional jury trial practices offer few opportunities for jurors to clarify their misunderstanding or even to bring it to the attention of the judge and attorneys. Permitting jurors to submit questions to witnesses provides a procedural mechanism for jurors to ask questions about the evidence or testimony presented at trial with minimal risk to the due process rights of the litigants. Jurors are instructed at the beginning of trial that they may submit questions that they would like to have asked of the witnesses in writing. If jurors submit questions, they are first marked for identification and then the judge reviews the questions with the attorneys out of the presence of the jury. If no evidentiary objections are sustained, the judge poses the question to the witness or permits the attorneys to do so as part of direct or cross-examination. Some juror questions may be inadmissibly phrased, but most of the judges felt comfortable rephrasing them provided that the substantive content was not admissible.

One of the judges who participated in the study summarized the benefits of permitting jurors to ask questions as follows:

> It enhances the jurors' understanding of the important fact issues and clears up significant misunderstandings. It enhances the attorneys' ability to intelligently address the key issues by informing the attorneys of specific issues that the jurors think are important and giving the attorneys the opportunity to clarify and further address the areas raised in the jurors' questions. It enhances the overall quality of the trial process by treating the jurors as important, active, responsible participants. And it enhances the experience of the jurors as active, intelligent, responsible participants and citizens of a democracy.[14]

All but two of the judges participating in the study permitted jurors to submit questions to witnesses in one or more trials. In total, this technique was used in 41% of the cases, although more often in civil trials (82%) than in criminal trials (19%), and more often by Superior Court judges (63%) than District Court judges (17%). Fifty-four percent (54%) of jurors reported that they were permitted to ask questions, and 46% reported that they did so.

On average, jurors submitted 13 questions per trial (median 7) of which 10 (median 5) were subsequently asked of witnesses. Some judges reported a few trials in which jurors would ask an excessive number of questions, but most felt that jurors respected the judges' instructions to let the attorneys develop the evidence and use questions only to clarify witness testimony. One measure of the reasonableness of juror questions is whether they are ultimately ruled admissible by the judge and asked of the witness. In this study, the vast majority of questions were asked of witnesses. In half the cases in which jurors were permitted to ask questions and did so, over 85% of the questions were asked of witnesses; at least 50% of juror questions were asked of witnesses in 90% of the cases in which jurors were permitted to ask questions and did so. See Appendix A for samples of questions submitted by jurors.

---

[14] Statement of Judge Charles J. Hely (Mar. 1, 2000).

When jurors were permitted to submit questions, the majority of judges (82%) felt this technique was helpful, and this assessment increased to 96% for those trials in which jurors actually submitted questions to witnesses (25). Judges who offered comments on this technique focused as often on the helpfulness of juror questions to the attorneys as to the jury, although several judges noted concerns about questions dealing with inadmissible evidence (e.g., breathalyzer tests). However, most judges felt that preliminary instructions, which explain that juror questions are subject to rules of evidence and that jurors should not take offense if a question is not asked, or speculate about the answer of an unasked question, adequately addressed these concerns.

Attorneys reflected greater ambivalence about this technique. Some found it helpful insofar that it focused the issues during trial and provided important clues about what information to emphasize in closing arguments. However, several attorneys cautioned that this technique, if not carefully controlled by the trial judge, would consume valuable time, confuse rather than clarify the issues, and interfere with the attorneys' advocacy role. One attorney recommended that trial judges always sustain objections raised by counsel to juror questions, regardless of whether a proper evidentiary reason exists. Another commented that he preferred the method of letting attorneys incorporate juror questions into direct and cross-examination rather than having the judge read the question directly to the witness.

H. Debriefing Jurors after Stressful Trials

Recent studies have found that some jurors find jury service to be a stressful experience, particularly in high profile cases and cases in which the evidence is especially

gruesome or emotionally disturbing.[15] Conducting a short debriefing session after the jury has returned its verdict is a recommended technique for reducing the level of juror stress and facilitating jurors' ability to return to their daily lives with minimal disruption. The debriefing generally consists of a short group session in which the jurors have the opportunity to explore and better understand their emotional reaction to the trial and to jury service. The debriefings also include a description of the symptoms commonly associated with juror stress (e.g., nightmares, depression, insomnia) and make recommendations about appropriate stress management practices.[16] In most instances, the debriefings can be conducted by a trained judge or member of the court staff, however in more serious cases, the court should contract with an experienced mental health professional to provide this assistance.

This technique was employed in 25 of the 150 trials (17%) included in the study, by 9 of the participating judges. Although this technique is generally reserved for trials in which the nature of the evidence or the legal and factual issues is believed to be particularly gruesome or emotionally upsetting to jurors, this technique was used in a remarkably diverse number of cases. Eighteen (18) were Superior Court and 7 were District Court trials; 19 were criminal trials and 6 were civil trials. The eight (8) judges that commented on the usefulness of this technique unanimously found it to be helpful.

I. Responding to Juror Questions about Final Instructions

Jury instructions pose one of the most difficult hurdles for juror comprehension of the law, in part because jury instructions are more often drafted to satisfy appellate scrutiny rather than to ensure juror comprehension. This technique provides jurors with

---

[15] NATIONAL CENTER FOR STATE COURTS, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS (1998).

an opportunity to ask questions of the judge about the final instructions before they retire for their final deliberations or during deliberations. Judges provided the jury with an opportunity to ask questions about final instructions in 30 (20%) trials, more often in civil trials (19 trials) and in Superior Court (28 trials). Although judges only indicated the helpfulness of this technique for 12 of these cases, they were unanimous in their support of it. On average, jurors asked only a single question about the final instructions in response to this opportunity (range of 0 to 4).

J. Providing Jurors with Written or Taped Jury Instructions

Written or audio taped jury instructions provide jurors with a reference tool for use during their deliberations. Thus, they decrease jurors' reliance on memory for specific provisions of the instructions and reduce the number of questions likely to be raised during deliberations. According to one judge, "[s]ince the time that I began to send a written or recorded copy of my instructions to the jury, questions from juries have become almost non-existent."[17]

Judges reported that they gave jurors a copy of the final jury instructions in either written or audio taped format in 72 cases (49%). Written instructions are required to be identical to the verbal charge delivered in court. Thus, some judges provide the jurors with a transcript of the charge as soon as it can be made available by the court reporter; other judges prepared the charge in writing and read it verbatim to the jury. There was no particular consensus about when jurors should receive the written instructions. Some judges provided copies before the charge was delivered in court, so jurors could read along as they were delivered; others preferred that jurors listen to the charge first.

---

[16] James E. Kelley, *Addressing Juror Stress: A Trial Judge's Perspective,* 43 DRAKE L. REV. 97 (1994).
[17] Statement of Justice Timothy S. Hillman (Mar. 2, 2000).

Those judges who commented on the helpfulness of this technique reported very high satisfaction – 98% found it helpful (42 cases). Juries that were provided with copies of instructions also asked fewer questions about the instructions than juries that did not have copies of instructions available to them, which provides some evidence that this technique may enhance juror comprehension of the instructions. Jurors asked no questions about the final instructions in 58% of the cases in which they were given copies compared to 25% of the cases in which jurors were not given copies of instructions.

There was a great difference in the utilization of this technique both between civil and criminal trials and between Superior Court judges and District Court judges. Written or typed jury instructions were provided to jurors in 38% of the civil trials (27) and 62% of the criminal trials (44). Superior Court judges provided copies of instructions in 76% of the reported cases (50), usually in audio-taped format (44 cases). District Court judges, in contrast, provided copies of instructions in only 24% of the cases (17), and used written and taped copies more or less equally. The comparative lack of use of this technique by the District Court judges may reflect the fact that District Court trials typically involve less complex factual and legal issues than those in Superior Court. Alternatively, it may indicate a need for additional resources (e.g., photocopy machines, tape recorders) to be provided to the District Court judges.

K. Providing Juror Notebooks

This technique consists of providing notebooks for jurors to use, particularly in lengthy trials and trials of complex cases. The contents of the notebooks will vary with the needs of the case. In highly complex cases, a notebook might consist of paper for taking notes, preliminary jury instructions, a short statement of the parties' claims and

defenses, a list of witnesses by name (including identifying information and phonetic spellings when helpful, copies of key exhibits, glossary of technical terms, and the final jury instructions.

In simpler cases, however, a "notebook" may not be necessary at all. Instead, it may be sufficient to provide only copies of important documents or exhibits. In many cases, it is not necessary to provide copies of the whole document, but just copies of the relevant pages that they jury should consider. Similarly, providing copies of the curriculum vitae of expert witnesses can also limit the amount of testimony concerning the experts' qualifications. In either case, it is important to inform the attorneys at pretrial to be prepared to give copies to all of the jurors. One judge recommended including requirements that attorneys prepare any documents to be published as an exhibit in three-hole punch form so that jurors could easily place the copies in their notebooks.[18]

Jurors were provided with trial notebooks including copies of trial documents for 18 (12%) of the 150 trials, generally in civil cases (14 trials) in Superior Court (14 trials). A total of 10 judges (7 Superior Court and 3 District Court) used this technique in at least one trial, and all reported that it was a helpful technique. The written comments of these judges were generally positive, particularly in cases involving large volumes of trial documents. The only concerns stated were the cumbersome nature of some of the notebooks due to the volume of materials and the quality of some of the jurors' copies. The judges also emphasized the importance of giving jurors the time to read the documents in the notebook. Although none of the judges advocated permitting the jurors

[18] Comment of Judge Timothy Hillman at the Roundtable Discussion on Massachusetts Innovative Jury Trial Practices (Newton, Mass., Feb. 28, 2000).

to bring notebooks home at night, most thought that sidebars with the attorneys or court recesses could be used for this purpose.

L. Giving Jurors Final Instructions before Closing Arguments

A key factor related to juror comprehension of the law is the timing the final jury instructions. Although most empirical studies have focused on the efficacy of preliminary instructions, a few have found that providing final instructions to the jury before the attorneys give their closing arguments serve a similar purpose. Only 3 judges (2 Superior Court and 1 District Court) used this technique in a total of 8 trials (6 civil and 2 criminal trials) in the study period.

M. Post-verdict Meetings with Judge, Jurors and Attorneys

This technique provides trial attorneys with an opportunity to listen to juror comments about the case, provided that all attorneys consent. It was used in a total of 6 trials by 5 judges (2 Superior and 3 District Court judges). The low number of trials in which these post-verdict meetings took place may be due to a preexisting ethics opinion that limited post-verdict attorney contact with jurors. At least one judge commented that this technique was helpful to attorneys, and many of the attorneys who were not permitted to meet with jurors after the trial indicated that they would welcome the opportunity to do so.

N. Placing Time Limits on Attorneys

This technique requires judges to establish time limits for attorneys to present evidence and testimony during trial, which has the practical effect of streamlining the attorneys' trial presentations, focusing the jury's attention on the most important disputed issues. It also reduces the amount of duplicative and extraneous testimony and evidence,

which is often the subject of juror complaints about trial. According to the study data, this technique was used in a total of 4 cases by 3 judges (2 Superior Court, 1 District Court) who indicated their unanimous approval for the technique. One commented that it reduced length of trial by a full week. Attorneys were less enthusiastic. Although time limits appear to be the norm for opening and closing arguments, most attorneys indicated their dislike for this technique with respect to the evidentiary segment of trials.

Commentary by the judges suggests that this technique may be used much more frequently on an ad hoc basis, however. For example, some judges will confer with the attorneys before trial about the anticipated length of the trial and then advise the jury on the first day of trial of this estimate, which generally had the effect of making the attorneys adhere to that estimate or risk alienating the jury.

O. Mini-opening Statements / Interim Commentary

This technique permits attorneys to present their opening statements in segments – a short statement at the beginning of trial and subsequent statements periodically throughout the trial. This approach gives attorneys the opportunity to describe for jurors how evidence supports their respective cases, thus improving juror comprehension. This technique was not widely used, however (only 3 cases by 2 judges). Although judges provided little commentary on the technique, and most attorneys showed little enthusiasm, this practice did receive a great deal of favorably publicity and favorable commentary by the attorneys in one recent Massachusetts trial presided over by Judge Raymond Brassard.[19]

P. Permitting Juror Discussions during Trial

In this technique, jurors are told that they may discuss the evidence presented at trial before final deliberations, subject to three conditions: they may only discuss the case when all of the jurors are present and only in the jury room, and they must only discuss the evidence and testimony presented at trial and not their verdict preferences. It is generally used in civil cases only. This technique was used in a total of 6 cases, all by the same Superior Court judge who reported that it was helpful.

Jurors were especially enthusiastic. Of the 67 jurors who served in these 6 trials[20] and reported participating in juror discussions, 93% reported that being allowed to discuss the evidence was somewhat or very helpful to them. Less than 2% found it not helpful.

---

[19] *See* Elizabeth Amon, *Shaking Up Juries, State by State,* NAT'L L. J. 1 (Feb. 5, 2000).
[20] Alternates also completed juror questionnaires.

Attorneys were the least enthusiastic. Most comments reflected the pervasive belief that such discussions encourage prejudgment by jurors, although these beliefs are not supported by empirical study.[21] At least one attorney, however, commented that although he had objected to the technique at trial, he thought that this technique made sense.

[21] *See* Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform,* 24 L. & HUMAN BEHAV. 359 (2000); Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Juror Discussions: The Views of Trial Participants, Judges and Jurors,* 32 UNIV. MICH. J. LEGAL REFORM 349 (1999).

V. STRUCTURAL / INSTITUTIONAL RECOMMENDATIONS

A. Pretrial Management

Many of the participating judges, particularly in the District Courts, reported that they were unable to use some of the reform practices as frequently as they might have liked because of the limited amount of time that they have to meet with the attorneys immediately preceding the trial. For example, imposing time limits on the parties' time at trial, preinstructing the jury, providing juror notebooks, and providing written copies of instructions to the jury all require a degree of preparation that cannot usually be accomplished on the morning of the day of trial. Although a comprehensive description of the benefits of effective pretrial management is beyond the scope of this report, one of the most cogent benefits with respect to jury trial procedure is that the attorneys often are better prepared for trial. Thus, they tend to offer a more coherent presentation to the jury, which aids juror comprehension of the evidence.

Because of the amount of coordination with court staff that is involved in the effective implementation of a successful pretrial management system, it generally requires the active support and involvement of the jurisdiction's chief judge or court administrator. Except in one-judge court jurisdictions, it cannot usually be accomplished by judges working individually. If jury reform practices such as the ones described above are to have a reasonable chance of success in Massachusetts, the Superior and District Court procedures should be restructured to provide judges with sufficient time and resources to more effectively conduct pretrial management of the cases on their dockets.

B. Essential Resources

Among the most common obstacles reported by judges to employing these practices in their trials were logistical problems associated with a lack of essential technological resources. For example, photocopiers and tape recorders are necessary for providing jurors with copies of instructions, but these were often unavailable or difficult to access. Similarly, not all judges feel sufficiently proficient with computer technology to be comfortable relying on it during jury trials. These types of resources should be standard for every courtroom.

C. Statutes / Court Rules

In general, the judges who participated in the study felt that Massachusetts judges should be widely encouraged to use the reform practices described in this report, but should not be required by statute or court rule to use them. This was particularly true for those practices most suitable for complex or unusual cases (e.g., juror notebooks, debriefings for juror stress). In some cases, however, judges indicated that it would be useful to have court rules issued clarifying that use of these practices was permissible under Massachusetts law.

Appendix A: Judges Participating in the Massachusetts Project on Innovative Jury Practices

Appendix B: Survey Instruments

Appendix C: Selected Juror Questions Submitted to Witnesses

Case No. 1: Automobile Tort

1: Were you seeing the chiropractor before the accident for pain in knee or anywhere else that you say you hurt in the second accident?

2: Was there unmelted snow on Route 2?

3. Did either car have any lights on?

4. Were there snowbanks to left of drive that would make it necessary for her to pull further out into road to see to left?

5. Is any part of her driveway before the breakdown lane on the road?

6. Had snow been plowed before the accident?

7. What kinds of cars were they both driving?

8. Where exactly did she pull her car to [accompanied by drawing of road showing primary and breakdown lanes]?

9. What part of the plaintiff's car was hit?

10. What kind of car was plaintiff driving?

11. How did the insurance company compensate the plaintiff?

12. What kind of car was the defendant driving?

13. Were Mr. ____'s lights on?

14. If Mrs. ____ can't answer, will we be able ask Mr. _____?

15. Who was cited?

16. Was the defendant's car out of control when it hit the plaintiff's car?

17. Is the defendant still driving?

18. Using this room as a reference, how far away were you from Mrs. _____ when you first saw her?

19. Did you speed up at all when you saw the other car coming? Or stop quickly before deciding to go forward?

20. How far could Mr. ___ see oncoming cars, etc. on the west-bound lane?

21. Could we see the pictures taken of the accident?

Case No. 9: Armed assault, DW, Firearm

1: Please give us the definition of "assault with intent to commit a felony".

2: What is the definition of the "felony"?

3: Did you actually see the gun fall inside the house?

4: Did you find the gun where was it?

5: Were finger prints taken?

6: Did this officer state that the defendant ENTERED the house?

7: What did Mr.____ say to you when you apprehended him?

8: Did you or hear anyone tell the defendant that you were looking for a gun or anything else before he said I don't have that stuff on me?

9: Is it technically possible for a loaded and locked .380 be dropped or thrown without it discharging?

10: (To Officer _____'s knowledge) If the gun was ready to be fired, would it be set off if you threw it to the floor or across a room?

11: Is it possible to tell in which hand the weapon was held from fingerprints?

12: How many points matched if you couldn't find eight?

13: What efforts if any did you make to Ms. ____?

Case No. 18: Operating Under the Influence

1: Was the defendant asked if he was wearing a seatbelt?

2: Do officers conclude on police report?

3: How did he hit the tree without going up on the sidewalk and how did he hit the right side of LeBlanc?

4: Is there a warning label on the antibiotic stating that it should not be taken with alcohol?

5: Were you aware that Field Sobriety tests check for posture as well as verbal when the officer asked if you had any health problems?

6: Can Defendant demonstrate for us his inability to stand on 1 leg or do toe-heel test?

7: Why did (the officer) not put the fingerprint in his report?

8: Was there a Breathalyzer?

9: Was a Breathalyzer test given? If so, what's the result? If not, why not?

10: Why is blood-alcohol level not presented?

11: Was the defendant asked to take a Breathalyzer test?

12: Did you refuse a breath test?

Case No. 20: Automobile Tort

1: Was it a clear, foggy, or rainy day?

2: Was a citation issued?

3: Could the position of the sun have been a factor in this accident? Re: Westbound driver's vision

4: Were either of the vehicles insured at the time of the accident?

5: Were they wearing seat belts?

6: Were seat belts worn injuries of drivers?

7: Witness was asked if Ms. Sa. said anything after the accident. She answered -yes. She said it was "her" fault. Who is "her" Ms. Sa. or Ms. St.?

8: Is K. receiving AFDC?

9: When asked what Ms. Sa said getting out of the car from the accident she answered "It was all her fault". Who's fault was she saying it was?

10: She says she "could not physically get around" - did her Primary Care Physician diagnose her as disable?

11: Was she able to lift her children/or youngest child before/after the accident?

12: Why did Mr. W. let the buyer drive the car without driving license?

13: Are we entitled to view the interrogatory statement from Mr. M. and Ms. Sa.?